

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFREY M. BARSHAW, and CINDY
WIERSMA-BARSHAW as individuals and
as a marital community,

Plaintiffs,

v.

PILGRIMS PRIDE COMPANY et al.,

Defendants.

Case No. C22-1673RSM

ORDER DENYING MOTION FOR
SUMMARY JUDGMENT ON
AFFIRMATIVE DEFENSE

I. INTRODUCTION

This case comes before the Court on Plaintiffs’ “Motion for Order on Summary Judgment Dismissing the Affirmative Defense of Failure to Mitigate.” Dkt. #15. Defendant Pilgrims Pride Company (“Pilgrims”) has filed an opposition. Dkt. #18. The Court has determined that it can rule on this issue without oral argument. For the following reasons, the Court DENIES Plaintiffs’ Motion.

II. BACKGROUND

On November 6, 2019, Plaintiff Jeffrey Barshaw purchased a box of frozen “Country Post” brand chicken, manufactured by Defendant Pilgrims. Dkt. #1-3; Dkt. #16 (“Barshaw Decl.”), ¶ 3.

He returned home, opened one of the sealed bags of frozen chicken, reached in, and had his palm pierced by a pair of metal shears inside the bag. *Id.*

1 He called his mom, who told him to go to a hospital. Dkt. #16 at ¶ 4. He went to urgent
2 care, where he says his hand was “wrapped,” he was advised that he had a nerve injury and that
3 they could not treat it further, and that “if the problem persisted, I should seek medical attention
4 from the emergency department.” *Id.*

5 The next day he saw a doctor. She consulted with a hand surgeon who recommended
6 that Mr. Barshaw go to the emergency room if his symptoms worsened or persisted. *Id.* at 6.
7 On November 11, 2019, after his hand “became red, irritated and increasingly painful” he went
8 to the emergency room. *Id.* at 7. Hand surgery followed. *Id.* at 10.

9 This case was filed in King County Superior Court on February 8, 2022. Dkt. #1-3.
10 Plaintiffs alleged Defendants’ actions were negligent and violated several other laws including
11 the Washington Products Liability Law, RCW 7.72 et seq. *Id.* The case was removed to this
12 Court on November 22, 2022. Prior to removal, the state court found Pilgrims liable under
13 RCW 7.72. As a result, the parties agree that trial will address damages only. Dkt. #12 at 2.

14 Pilgrims filed an Answer with 47 affirmative defenses, including one for failure to
15 mitigate. Dkt. #15 at 2. Plaintiffs now move for summary judgment dismissal of that
16 affirmative defense only. Dkt. #15.

17 **III. DISCUSSION**

18 **A. Legal Standard for Summary Judgment**

19 Summary judgment is appropriate where “the movant shows that there is no genuine
20 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.
21 R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are
22 those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at
23 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of
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1 the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco,*
2 *Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny &*
3 *Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

4 On a motion for summary judgment, the court views the evidence and draws inferences
5 in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S.*
6 *Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable
7 inferences in favor of the non-moving party. *See O’Melveny & Meyers*, 969 F.2d at 747, *rev’d*
8 *on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient
9 showing on an essential element of her case with respect to which she has the burden of proof”
10 to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

13 **B. Analysis**

14 Plaintiffs cite a declaration of Mr. Barshaw and ask the Court “to find that there is no
15 genuine issue of material fact whether Barshaw acted reasonably following his injury....
16 [because] he followed the advice of his health care providers and sought surgery at the earliest
17 available opportunity.” Dkt. #15 at 2. Plaintiffs point to the Washington Pattern Instructions
18 for avoidable consequences, which discuss the “failure of the injured person to exercise
19 ordinary care to avoid or minimize such new or increased damage,” and which urge the jury to
20 consider “the nature of the treatment, the probability of success of such treatment, the risk
21 involved in such treatment, and all of the surrounding circumstances.” *Id.* at 5 (citing WPI
22 33.01 and WPI 33.02).

25 Pilgrims rebut Mr. Barshaw’s declaration with citations to the medical records. For
26 example, the record for Mr. Barshaw’s initial urgent care visit states “I recommend patient go to
27 Swedish Mill Creek ER for further evaluation of his wound and treatment.... ER notification
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1 made to the ER.” Dkt. #19-1 at 6. At Mr. Barshaw’s next medical appointment, the records
2 state the patient “[w]ent to [urgent care], was told to go to ER but he didn’t. He went home
3 instead.” Dkt. #19-2 at 3. Pilgrims also cites to testimony from its expert witness.

4 On Reply, Plaintiffs point out that Mr. Barshaw may have avoided the emergency room
5 due to financial considerations. Dkt. #21 at 7–8.

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7 The medical records appear to contradict Plaintiff’s version of events. Did he decline to
8 follow medical advice? Was that reasonable? Whether this is a flat contradiction or otherwise is
9 up to the jury. The issue at hand is failure to mitigate. Delaying an ER visit is obviously
10 material given the subsequent exacerbation of Mr. Barshaw’s injury. The Court must draw all
11 reasonable inferences in favor of the non-moving party. Pilgrims does not need to submit
12 expert testimony to the Court to prove anything at this stage in the litigation. Because there is a
13 genuine dispute of material fact, summary judgment cannot be granted. The Court cannot rule
14 as a matter of law that his actions were reasonable because he felt he could not afford a trip to
15 the emergency room. Whether or not Mr. Barshaw failed to mitigate his damages is an issue of
16 fact for the jury.
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19 IV. CONCLUSION

20 Having reviewed the relevant briefing and the remainder of the record, the Court hereby
21 finds and ORDERS that Plaintiffs’ “Motion for Order on Summary Judgment Dismissing the
22 Affirmative Defense of Failure to Mitigate,” Dkt. #15, is DENIED.
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24 DATED this 25th day of April, 2023.

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27 RICARDO S. MARTINEZ
28 UNITED STATES DISTRICT JUDGE